

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARIO RODRIGUEZ-MORALES,)	CASE NO.	C05-0366-MJP-MAT
)		(CR04-263-MJP)
Petitioner,)		
)		
v.)		
)	REPORT AND RECOMMENDATION	
UNITED STATES OF AMERICA,)		
)		
Respondent.)		

INTRODUCTION

Petitioner, a Mexican national currently incarcerated in a federal prison in Manchester, Kentucky, has filed a *pro se* motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence. (Dkt. #1). The government has filed a response. (Dkt. #6). Having considered the motion, response, and the balance of the record, the court concludes, for the reasons discussed below, that the motion should be denied.

PROCEDURAL HISTORY

On July 13, 2004, petitioner and the government entered into a plea agreement pursuant to which petitioner agreed to plead guilty to two counts of violating 8 U.S.C. § 1325(a), Unlawful Entry by Eluding Examination and Inspection by Immigration Officers. (Dkt. #14 in Case No. CR04-263P). In exchange, the government agreed to recommend a sentence of 6 months in prison for the first count and a concurrent sentence of 24 months for the second count, for a total

01 term of 24 months. (*Id.*) On October 18, 2004, the court accepted the parties' recommendation
02 and sentenced petitioner to a total of 24 months in prison. (Dkt. #21 in Case No. CR04-263P).¹

03 On March 7, 2005, petitioner filed the instant motion under 28 U.S.C. § 2255 to vacate,
04 set aside, or correct his sentence. (Dkt. #1). On March 14, 2005, this matter was referred to the
05 undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b) and Local Rules MJR 3 and 4.
06 (Dkt. #4). The government filed its response to petitioner's § 2255 motion on March 22, 2005.
07 (Dkt. #6). Petitioner has not filed a reply to the government's response. The matter is now ready
08 for review.

09 DISCUSSION

10 In his § 2255 motion, petitioner raises a single claim for relief: ineffective assistance of
11 counsel. (Dkt. #1 at 5). Specifically, petitioner argues that his attorney "did not argue downward
12 departure at sentencing due to nature of charge." (*Id.*)

13 A claim of ineffectiveness of counsel is reviewed according to the standard announced in
14 *Strickland v. Washington*, 466 U.S. 668, 687-90 (1984). In order to prevail, petitioner must
15 establish two elements. First, he must establish that counsel's performance was deficient, *i.e.*, that
16 it fell below an "objective standard of reasonableness" under "prevailing professional norms."
17 *Strickland*, 466 U.S. at 687-88 (1984). Second, he must establish that he was prejudiced by
18 counsel's deficient performance, *i.e.*, that "there is a reasonable probability that, but for counsel's
19 unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466
20 U.S. at 694.

21 Regarding the first prong of the *Strickland* test, there is a "strong presumption that
22 counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*,
23 466 U.S. at 689. Thus, "[j]udicial scrutiny of counsel's performance must be highly deferential."
24

25 ¹ Petitioner states in his motion that he filed an appeal to the Ninth Circuit Court of
26 Appeals and that the Ninth Circuit affirmed his conviction and sentence. (Dkt. #1 at 2). However,
the court's records do not reveal such an appeal, nor does an electronic search of Ninth Circuit
cases.

01 *Id.* The test is not whether another lawyer, with the benefit of hindsight, would have acted
02 differently, but whether “counsel made errors so serious that counsel was not functioning as the
03 ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* at 687, 689.

04 In its response, the government argues that petitioner’s attorney was precluded from
05 seeking a downward departure at sentencing because the parties had agreed in the plea agreement
06 to ask the court to impose a specific sentence, *i.e.*, 24 months. (Dkt. #6 at 4). Had petitioner’s
07 attorney asked for a downward departure, the government would have considered the plea
08 agreement to have been breached and would have sought to charge petitioner with a more serious
09 crime: violating 8 U.S.C. § 1326(a), “Illegal Reentry After Deportation.” (*Id.*) According to the
10 government, such a crime would have carried a potential maximum sentence for petitioner of 20
11 years in prison. (*Id.*)

12 Applying the principles articulated above, the court finds that petitioner fails to satisfy
13 either prong of the *Strickland* test. Under the plea agreement negotiated by his attorney,
14 petitioner received a 24-month sentence and was not exposed to the 20-year maximum which he
15 could have faced. Thus, counsel’s performance was not deficient. In addition, petitioner does not
16 show how his attorney could have successfully argued that the court should depart downward
17 from the recommended sentence. Petitioner therefore fails to show that he was prejudiced by his
18 attorney’s allegedly deficient performance. Because he fails to satisfy the *Strickland* test,
19 petitioner’s claim, and his § 2255 motion, should be denied.

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

CONCLUSION

For the foregoing reasons, petitioner's motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence, should be denied. Because the record conclusively establishes that petitioner is not entitled to relief, an evidentiary hearing is not required. *See Marrow v. United States*, 772 F.2d 525, 526 (9th Cir. 1985). A proposed Order is attached.

DATED this 4th day of May, 2005.



Mary Alice Theiler
United States Magistrate Judge